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Supreme Court, U.S.
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No. 97-1104

In the

Supreme Court of the United States

October Term, 1997

YVETTE FARMER,
Petitioner,

v.

UNIVERSITY AND COMMUNITY
COLLEGE SYSTEM OF NEVADA,
Respondent.

Petition for Writ of Certiorari to the Nevada Supreme Court

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In addressing the propriety of a race-based employment decision under Title VII of the Civil Rights Act of 1964, the court below held: "The University demonstrated that it has a compelling interest in fostering a culturally and ethnically diverse faculty." Petition for Writ of Certiorari, Appendix (App.) A-7. In addressing the propriety of a race-based employment decision under Title VII of the Civil Rights Act of 1964, the United States Court of Appeals for the Third Circuit held that "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547, 1558 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997). These decisions are in conflict. This conflict warrants review by this Court.

THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER NONREMEDIAL RACE-BASED EMPLOYMENT DECISIONS ARE EVER PERMISSIBLE UNDER TITLE VII OF THE CIVIL RIGHTS ACT

The petition for writ of certiorari argued that this Court should grant review to resolve an important question of federal law that currently divides the lower courts. Respondent's Brief in Opposition (Respondent's Brief) claims that the *Taxman* decision and the case at bar are factually distinguishable. It does not, however, attempt to explain how the Nevada Supreme Court's legal conclusion that racial diversity is a permissible goal under Title VII can be reconciled with the Third Circuit's legal conclusion that diversity is not a permissible goal under Title VII. As respondent, the University and Community

College System of Nevada (University), concedes by this omission, these two legal conclusions cannot be harmonized. Although the University makes no attempt to defend the lower court's decision that the desire to achieve a "racially diverse" workforce allows an employer to contravene the plain language of Title VII, the University's brief does require petitioner, Yvette Farmer, to make two points of clarification.

A. The Facts of the Case

A jury found Yvette Farmer had been discriminated against by the University and awarded her $40,000 in damages. App. A-4. The Nevada Supreme Court found that, as candidates for the position, Yvette Farmer and Johnson Makoba were "equal in most respects." App. A-7. That court held, however, that the University did not violate Title VII by hiring Mr. Makoba, and not Ms. Farmer, because of its desire to achieve a racially diverse faculty. Despite these facts, the University relies on assertions rejected by the jury and the Nevada Supreme Court to argue that Mr. Makoba was the more qualified candidate and, therefore, that this case "is not even about Title VII or affirmative action, for quite simply the individual most qualified for the job was hired." Respondent's Brief at 5. This argument cannot withstand scrutiny.

It is basic hornbook law that a factual issue, such as which of two candidates is more qualified for a job, is to be decided by the trier of fact. In this case, the trier of fact awarded Yvette Farmer $40,000 in damages because of the University's discrimination. App. A-4. In order to find that Ms. Farmer had been discriminated against, the jury could have found that she was ***more*** qualified than Mr. Makoba, or they could have determined that she and Mr. Makoba were ***equally*** qualified.

What they could not have found, however, is that Ms. Farmer had been discriminated against by the University because she was ***less*** qualified than the candidate they hired. Simply put, had the more qualified candidate been hired, there would have been no finding of discrimination. This factual finding was not disturbed by the Nevada Supreme Court.[1] Had the court below determined that Mr. Makoba was more qualified than Ms. Farmer, it would have been completely unnecessary for the court to engage in a discussion of the University's racially discriminatory hiring program. The court below did, however, engage in an extensive--albeit erroneous--analysis of the legality of the University's hiring program. "We also view the desirability of a racially diverse workforce as sufficiently analogous to the constitutionality permissible attainment of a racially diverse student body countenanced by the *Bakke* Court." App. A-5. That section of the lower court's opinion, which it entitled "Affirmative Action Analysis," would have been entirely superfluous had it (or the jury below) determined that Mr. Makoba was more qualified for the position than Ms. Farmer. It is too late in the day for the University to argue that this "is not even a case about Title VII or affirmative action." Respondent's Brief at 5. The jury, the majority opinion of the Nevada Supreme Court, and dissenting opinion of the Nevada Supreme Court have all recognized that this most certainly is a case about Title VII and affirmative action.

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[1] According to the court below, "the curriculum vitae for both candidates revealed comparable strengths with respect to their educational backgrounds, publishing, areas of specialization, and teaching experience. The search committee concluded that despite some inequalities, their strengths and weaknesses complemented each other." App. A-2, A-3.

B. The Legal Issues of the Case

Essentially, the University argues that this case is more similar to *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987), than to *Taxman* and, therefore, the petition for writ of certiorari should be denied. This argument fails as a matter of law and fact.

In *Weber*, this Court examined the employment practices of an aluminum and chemical plant located in rural Louisiana. Although 39% of the local workforce was black, only 1.83% (5 out of 273) of the skilled craft workers were black. *Weber*, 443 U.S. at 198-99. Recognizing that Title VII was enacted to "eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Weber*, 443 U.S. at 204, this Court upheld the employer's use of a racially discriminatory training program. In *Johnson*, this Court was confronted with a job category in which ***none*** of 238 positions available had been held by a woman. *Johnson*, 480 U.S. at 621. Summarizing the holdings of these cases, the Third Circuit recently explained that, while *Weber* and *Johnson* tolerate racial and gender preferences "to erase the effects of prior discrimination, ***these rulings do not open the door to additional non-remedial deviations***." *Taxman*, 91 F.3d at 1558 (emphasis added).

This case falls outside the parameters of permissible race-conscious employment decisions established by *Weber* and *Johnson*. Unlike those cases, "this is not a case of remedial affirmative action." App. A-14 n.2. (Springer, J., dissenting). The University recognizes that its percentage of black faculty "is similar" to the balance of black faculty at institutions of

higher education throughout the United States. Respondent's Brief at 5-6. The University never refutes Ms. Farmer's claim that the racial balance of the University's full-time instructional faculty is nearly a mirror image of the average racial balance of all institutions of higher learning in the United States.[2] These statistics serve to underscore the finding of the Nevada Supreme Court that qualified minority Ph.D. candidates are in "short supply." App. A-3, A-10.

Hence, this is not a case where only 1.83% of the craft workers are black, although 39% of the workforce are black. Nor is this a case where none of the 238 positions in the applicable job category is held by a woman. Instead, this is a case where the University faculty is composed of between 11% and 13% minority full-time faculty members. App. A-2. A racial composition that is nearly identical to the average racial composition of all United States institutions of higher learning. The statistics underlying this Court's decisions in *Weber* and *Johnson* betrayed an atrocious pattern of discrimination. The statistics in this case, on the other hand, show a University faculty that is as racially diverse as the average University faculty in this country. The 11% to 13% minority faculty at the University of Nevada at Reno is a far cry from the less than

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[2] The University, although never questioning the accuracy of Ms. Farmer's statistics, does object to their being raised in the petition. Respondent's Brief at 5-6. In *Weber*, relying in part on government studies, this Court took judicial notice of the fact that exclusions from crafts on racial grounds had occurred. *Weber*, 443 U.S. at 198 n.1. Likewise, this Court should take judicial notice of the United States Department of Education's statistics offered by Ms. Farmer in this case.

2% minority workforce in *Weber* or the complete absence of female employees at issue in *Johnson*. The court below did not find that the University's unwritten affirmative action program was necessary to remedy prior discrimination. Rather, the court found that the University was justified in hiring Mr. Makoba, and then paying him significantly more than his colleagues,[3] based on the University's desire to increase the racial diversity of its faculty. App. A-7, A-11. This rationale is in conflict with the *Taxman* decision which held that, "unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute and, therefore, cannot satisfy the first prong of the *Weber* test." *Taxman*, 91 F.3d at 1557.

Contrary to the University's arguments, the issue in *Taxman* was not narrow nor has Ms. Farmer misstated the issue in that case. Respondent's Brief at 7. Although the facts of the *Taxman* case may have been unique, the legal issue presented by that case is broad enough to affect every employer in the country who is subject to Title VII: Does Title VII of the Civil Rights Act of 1964, as amended, permit employers to take race into account for purposes other than remedying past discrimination? This Court has already recognized that this question is worthy of review. *Taxman*, 117 S. Ct. 2506. Now, with the split of authority generated by the Nevada Supreme Court's opinion, the

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[3] From the outset of this litigation, Ms. Farmer has contended that the pay differential violated ***both*** the Equal Pay Act and Title VII. Hence, it is erroneous for the University to claim that the pay difference was not raised as a violation of Title VII below. It is also erroneous to suggest, as the University does, that a $10,838 pay deferential did "not unnecessarily trammel" Ms. Farmer's interests. Respondent's Brief at 12.

resolution of this issue becomes even more imperative. For these reasons, this Court should grant the petition for a writ of certiorari.

DATED: February, 1998.

Respectfully submitted,

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